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Supreme Court of the United States

OCTOBER TERM, 1940

No. 499

FRANK TENNYSON NEELY,

Petitioner,

vs.

MERCHANTS TRUST COMPANY OF RED BANK, NEW JERSEY, AS ADMINISTRATOR OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, ET AL.

PETITION FOR REHEARING.

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BATAVIA TIMES, LAW PRINTERS,
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MERCHANTS TRUST COMPANY OF RED BANK, NEW JERSEY, AS ADMINISTRATOR OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, AND FREDERICK H. TARR, AS ANCILLARY ADMINISTRATOR IN THE STATE OF MASSACHUSETTS OF THE ESTATE OF ELIZA A. S. CALEF, DECEASED, AND MARY L. HODGKINS, HARRIET G. STACY, JAMES D. STACY, FANNY K. STACY, MARY S. STACY, ANNA S. LUFKIN, GILBERT C. McCORMICK, HARRY McCORMICK, LOLA ROBINSON, HETTIE M. MORSE, JENNIE M. SAYWARD, CLIFFORD E. STACY, FRED C. STACY, EVERETT STACY, WILLIAM A. HAMILTON, DORIS ALVORD, ALBERT J. McCORMICK.

PETITION FOR REHEARING.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Frank Tennyson Neely, petitioner, prays that a rehearing be granted of his petition for certiorari herein, which

was denied by this Court on November 18, 1940, wherein he sought to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered on June 29, 1940 (which became final upon denial of his petition for a rehearing thereof on September 11, 1940) and in support thereof he respectfully shows:

Opinions Below.

The opinion of the District Court denying the motion to dismiss the complaint, is reported in 16 F. Supp. 839 (R. 24-7) and its opinion dismissing the bill after trial is reported in 26 F. Supp. 130 (R. 1588-93). The opinion of the Circuit Court of Appeals denying the motion to dismiss the appeal is reported in 110 F. (2) 525 (R. 1725), its opinion affirming the District Court is reported in 113 F. (2) 953 (R. 1729-33) and its opinion denying the petition for rehearing is unreported (R. 1737-8). The petition for certiorari was docketed on October 10, 1940 and was denied without opinion on November 18, 1940 (No. 499 October Term, 1940, 311 U. S. ...). This petition is filed within less than twenty-five days thereafter, under Rule 33.

Jurisdiction.

The jurisdiction of this Court was invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347 (a)) and Rule 38 (5) (b) of the Rules of this Court. This Rule provides:

> "A review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following while neither con-

trolling nor fully measuring the court's discretion, indicate the character of reasons which will be considered. * * *

"(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been but should be settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision".

It is respectfully submitted that the present case is directly analogous to *United States v. Stevens*, 15 F. Supp. 139, 89 F. (2) 151, certiorari granted in 302 U. S. 666 and decision below reversed in 302 U. S. 623, and that, as in the *Stevens* case, the petition for certiorari should be granted and the decision below reversed upon the ground that it is in substantial conflict with applicable local decisions, as well as in conflict with the decisions of other circuit courts of appeal and with applicable decisions of this Court.[1]

Grounds of Rehearing.

1. This Court has overlooked or misapprehended the fact that the decision below is directly in "substantial conflict" with applicable New Jersey decisions, and with decisions of this Court and of the Second, Fourth, Fifth,

[1] Cf. *Thompson, Trustee v. Magnolia Pet. Co.*, 308 U. S. 630; *White v. Texas*, 309 U. S. 631; *Crane-Johnson Co. v. Commissioner*, 309 U. S. 692; *Fleisher Eng. & Const. Co. v. United States*, 309 U. S. 693; *New World Life Ins. Co. v. United States*, 310 U. S. 654; *Republic Steel Corp. v. N. L. R. Bd.*, 310 U. S. 655, *Neuberger v. Commissioner*, 310 U. S. 655 where petitions for rehearing were granted at the October Term, 1939; *Milk Wagon Drivers Union v. Meadowmoor Dairies Inc.*, 310 U. S. 655 where a *second* such petition was granted.

Sixth, Seventh, Eighth, Ninth and Tenth Circuit Courts of Appeal.

2. Such conflict is plainly made a ground for review on writ of certiorari by the express provisions of Rule 38 (5) (b) above quoted, pursuant to which the petition for certiorari was filed herein.

3. Such conflict has been the stated basis for granting certiorari in virtually every opinion of this Court at the October Term, 1940 published to date (Nos. 5, 16, 13, 50, 121, 8, 26, 15, 23, 24, 25, 27) and, in the absence of any declared abrogation of Rule 38 (5) (b), no other or different decision should follow in this cause (No. 499).

4. The printed petition for certiorari herein was duly filed on October 19th, 1940, and respondents' brief in opposition was filed on November 5th. On that date the Clerk of the Court telegraphed petitioner's counsel, pursuant to Rule 38 (4) (a):[2] "Reply brief accepted if received by November fifteenth." A reply brief accordingly was filed on November 15th which it is assumed was the date of submission to the Court pursuant to the aforesaid Rule.

Nevertheless the decision denying the petition was announced on Monday, November 18th. Since the Court was engaged in hearing oral arguments in five cases on the 15th,[3] Saturday the 16th was a conference day at which Monday's decisions were determined upon and the 17th was Sunday it would appear physically impossible for the several Justices to have examined the 180 authorities cited by the respective parties or the 478 record references contained in the briefs of the 2003 page record between the date of final submission and the date on which the decision was formally announced.

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[2] Rule 38 (4) (a) provides: "Timely reply briefs will be considered but distribution under this rule shall not be delayed pending the filing of such briefs."

[3] Nos. 34, 35, 38, 39, 40 October Term, 1940.

Conflicts Involved.

A. The decision of the Circuit Court of Appeals is in substantial conflict with applicable New Jersey decisions.

1. As set forth in the petition for certiorari, the contract to devise of which petitioner sought specific performance was embodied in the will itself (R. 202, 1722-3) which was drafted by the deceased promisor, duly executed by her in the promisee's presence, delivered to him as custodian and thereafter retained and relied upon by him down to within a month of her death when it disappeared.[4] The New Jersey rule is that this paper proved the contract, even though (because of disappearance of the original) ineffective as a will (*Laune v. Chandless,* 99 N. J. Eq. 186, 187; *Kastell v. Hillman,* 53 N. J. Eq. 49). This Court has overlooked or misapprehended the conflict created by the circuit court of appeals in holding, contrary to this settled rule of local law, that the contract was not thereby established (*cf. Ruhlin v. N. Y. Life Ins. Co.,* 304 U. S. 202, 206. See also *Fidelity Union Trust Co. v. Field* now awaiting decision, No. 32 October Term, 1940).

2. The certiorari petition similarly set forth a full statement of the evidence (pp. 4, 8, 13) showing that the deceased promisor, down to her last words, was devoted to petitioner and completely satisfied with his performance of the contract for nine years. The rule in these cases is that she alone was the sole judge of the adequacy and sufficiency of the consideration furnished for her promise, *i. e.* the services rendered by petitioner, and that no stranger

[4] Together with his own reciprocal will and his own securities (R. 580-2, 1070-2, 1504-6. *In re Calef's Will,* 109 N. J. Eq. 181, 199; 111 N. J. Eq. 355, 288 U. S. 606.)

to the contract can be heard to dispute them (*Johnson v. Hubbell,* 10 N. J. Eq. 332, 335; *Schutt v. Missionary Society,* 41 N. J. Eq. 115). The circuit court of appeals in purporting to reexamine petitioner's performance and in holding that it was defective was in plain conflict with the applicable local law. It also disregarded the trial court's conclusive finding (supported by substantial evidence and nowhere challenged) that petitioner's performance benefitted the deceased promisor in the last year alone of her life to the extent of $60,000 (R. 1705-6).

3. It was likewise established in a prior litigation between the same parties (*In re Calef's Will,* 109 N. J. Eq. 181, 111 N. J. Eq. 355, *Neely v. Stacy,* 288 U. S. 606)[5] that the respondents herein by their present counsel had strenuously urged to petitioner's prejudice the very existence of this contract now sued upon. The circuit court of appeals in holding that respondents were not conclusively estopped by their own prior judicial admission of the contract as an established fact from denying its existence in this action, created a substantial conflict with the local rule, both in equity and in law (*In re Allison's Estate,* 106 N. J. Eq. 55; *Marsh v. Mitchell,* 26 N. J. Eq. 497; *Cleaves v. Yeskel,* 104 N. J. L. 497; *Christy v. N. Y. C. & H. R. R. Co.,* 90 N. J. L. 540).[6]

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[5] Although certiorari was denied in that case on February 13, 1933 it was denied unquestionably because the federal constitutional question (denial of due process by the state court of last resort) was not raised until by motion for reargument in the highest state court which had then (unknown to petitioner) sent down the remittitur and consequently had lost jurisdiction to rule adversely upon the federal question. (See Respondents' brief in No. 622, October Term, 1932.)

[6] Cf. 8 Hughes: Federal Practice Sec. 6302, p. 549, quoting Mr. Justice Van Devanter: "Whenever we find such a conflict that, without more, leads to the granting of the petition, if the case be one in which a petition for certiorari will lie." (Hearings before a subcommittee of the Senate Committee on the Judiciary, 68th Cong. 1st Sess. on S. 2062 and S. 2061 Feb. 2, 1924, p. 29.)

4. It was likewise established that petitioner was not a next of kin; that he gave up other business opportunities, changed his mode of life and took up his abode with the promisor, devoting his time exclusively to the management of her affairs for a period of nine years which can no longer be restored to him; that his services were unique and not of readily ascertainable pecuniary value; that they consisted in collecting the promisor's assets, providing her with gifts and loans in order that she might continue to live in her accustomed style and comfort, working out her debts, caring for her and improving her property—all in reliance on the written promise of the residuary devise made to him. In holding that these facts, when coupled with the decedent's own uncontradicted admissions to nine disinterested witnesses of her obligation, did not constitute a contract specifically enforceable in equity, the court of appeals acted in substantial conflict with the applicable local decisions (*Johnson v. Hubbell,* 10 N. J. Eq. 332; *Van Duyne v. Vreeland,* 12 N. J. Eq. 142; *Davison v. Davison,* 13 N. J. Eq. 246; *Schutt v. Missionary Society,* 41 N. J. Eq. 115; *Pflugar v. Pultz,* 43 N. J. Eq. 440; *Young v. Young,* 45 N. J. Eq. 27; *Vreeland v. Vreeland,* 53 N. J. Eq. 387; *Riley v. Allen,* 54 N. J. Eq. 495; *Winfield v. Bowen,* 65 N. J. Eq. 636; *Lawrence v. Prosser,* 88 N. J. Eq. 43; *Danenhauer v. Danenhauer,* 105 N. J. Eq. 449; *Ochs v. Ochs,* 122 N. J. Eq. 143).

5. Likewise there was no objection to specific enforcement of the contract because it provided for the net residuary estate after certain specific ascertained deductions and the opinion of the circuit court of appeals to the contrary plainly conflicted with the local rule applicable (*Van Duyne v. Vreeland,* 12 N. J. Eq. 142).

6. The circuit court of appeals likewise, in determining (despite the absence of any pleading or proof of this af-

firmative defense) that petitioner should be denied relief because he had "unclean" hands decided in conflict with the applicable local rule that to establish this defense there must be unconscionable conduct based upon actual knowledge or wilful fraud (*Vulcan Detining Co. v. American Can Co.*, 72 N. J. Eq. 387; *Shotwell v. Stickle*, 83 N. J. Eq. 188, 193; *Journal Plaza Holding Co. v. G. H. L. Co. Inc.*, 107 N. J. Eq. 14, 18-19) or misconduct performed in the particular matter or transaction for which relief is now sought (*Neubeck v. Neubeck*, 94 N. J. Eq. 167, 170; *Griffin v. Whittemore*, 109 N. J. Eq. 204, 205). This court has misapprehended or overlooked this conflict—particularly in view of the record which shows that the counterclaim charging petitioner with misconduct was voluntarily withdrawn at the conclusion of the entire case; the trial court ruled that the entire record of petitioner's relationship with the decedent did not establish any impropriety in his handling of her affairs (R. 1586) and respondents conceded that there was no issue whatsoever in the case other than the contract—that if the contract was established, petitioner was entitled to a decree (R. 1153-4, 1583, 1585, cf. *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 248). Plainly the circuit court of appeals could not of its own motion inject for the first time on appeal an alleged issue of "clean hands" in the case as a bar to the relief requested.

B. The decision of the Circuit Court of Appeals is in substantial conflict with applicable decisions of this Court.

1. This Court has plainly held that parties cannot blow hot and cold in successive litigations (*Philadelphia etc. R. Co. v. Howard*, 54 U. S. 307; *Railway Co. v. McCarthy*, 96 U. S. 258; *Davis v. Wakelee*, 156 U. S. 680). The denial of certiorari is tantamount to an overruling of these decisions

and a rejection of the principle, firmly imbedded in our jurisprudence, that having once urged the contract to defeat petitioner in the prior probate proceeding, they can not, when suit for its enforcement is subsequently brought between the same parties, turn around and repudiate its very existence as an established "important fact."

2. This Court likewise had plainly held that the admission of counsel is binding *(Oscanyan v. Arms Co.,* 103 U. S. 261). Here the contract was judicially admitted in writing by respondents' present counsel in the probate proceeding (R. 31-6). All other issues herein excepting the contract were likewise flatly conceded by him on the record at the conclusion of the trial below (R. 1153-4, 1583, 1585).

3. This Court has also overlooked or misapprehended the application of its own decisions *(United States v. Stevens,* 302 U. S. 623; *Brown v. Sutton,* 129 U. S. 238; *Townsend v. Vanderwerker,* 160 U. S. 171; *Whitney v. Hay,* 181 U. S. 77) in which the relief herein requested was granted by this Court on facts parallel to those here. While these decisions were rendered prior to *Erie R. Co. v. Tompkins,* 304 U. S. 64, which declares the local law to be applicable, and involved the rule in Massachusetts, Wisconsin and the District of Columbia respectively, the local law involved in those cases was in fact identical with the New Jersey law invoked here.

C. The decision below of the Circuit Court of Appeals for the Third Circuit is in direct conflict with applicable decisions of the Circuit Courts of Appeal for the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits.

1. The order of the trial court of April 6, 1936 which struck respondents' denial of the contract and which was never thereafter vacated, modified or appealed settled the

law of the case and framed the issues remaining to be tried *(Zadig v. Aetna Ins. Co.*, 42 F. (2) 142 (C. C. A. 2); *Dodd v. Union Indemnity Co.*, 32 F. (2) 512 (C. C. A. 4); *Merchants Ins. Co. v. Lilgeomont*, 84 F. (2) 685, (C. C. A. 5); *Page v. Arkansas Nat. Gas Corp.*, 53 F. (2) 27 (C. C. A. 8); ***Turner v. Kirkwood,*** 62 F. (2) 256 (C. C. A. 10)). These cases were selected from the myriad available as subsequent to the decision of this court in *Messenger v. Anderson*, 225 U. S. 436. While a trial court may have the power to reverse a prior order during the pendency of the trial before it, the power is one to be sparingly and cautiously exercised only for good cause shown and in special circumstances *(id.)*. Here no evidence or claim was ever advanced during the trial that the judicial admission upon which the order of April 6, 1936 was entered was inadvertent, that it was unauthorized or even that it was contrary to the fact—and the evidence subsequently received merely tended to corroborate its correctness. Even if, as the circuit court erroneously held, the trial judge had power to reverse himself later, no case will be found anywhere which justified such complete disregard of the law of the case rule as to permit the reframing of issues and dismissal of the complaint for alleged failure to prove issues hitherto non-existent—*two years* after the taking of all evidence had concluded and the case had closed.

The sanctioning of this procedure by the denial of certiorari herein obviously is such plain error and denial of due process that the action of this Court in overlooking or disregarding the patent injustice created thereby is such as to be corrected upon rehearing by this Court *ex mero motu*[7] even irrespective of the direct and substantial

[7] *The Amiable Isabella*, 19 U. S. 1, 50, 65; *Green v. Biddle*, 21 U. S. 1, 17, 18; *Dred Scott v. Sandford*, 60 U. S. 393, 399; *Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339; *Johnson v. U. S. Shipping Bd. Emergency Fleet Corp.*, 279 U. S. 819; *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 480.

conflict with the decisions in the other circuits above referred to.

2. The decision of the circuit court of appeals likewise is in substantial conflict with the decisions in the sixth and tenth circuits in *Ohlendiek v. Schuler*, 299 Fed. 182, cert. den. 266 U. S. 608 (C. C. A. 6) and *Brooks v. Yarborough*, 37 F. (2) 527 (C. C. A. 10) where relief by a decree for specific performance and the impressment of a trust was granted although the contract in suit was not as here (1) admitted under the pleadings, (2) judicially admitted by respondents and (3) established by the written contractual language of the will itself.

3. Likewise the decision of the circuit court of appeals is in direct conflict with the many decisions since *Oscanyan v. Arms Co.*, 103 U. S. 261 upholding the conclusiveness of admissions by counsel *(Scaife v. Western N. C. Land Co.*, 90 Fed. 238 (C. C. A. 4); *France Mfg. Co. v. Jefferson Electric Co.*, 106 F. (2) 605 (C. C. A. 6); *Ill. Cent. R. Co. v. Norris*, 245 Fed. 926 (C. C. A. 7); *Christy v. A. T. & S. F. Ry. Co.*, 233 Fed. 255 (C. C. A. 8); *Clark & Wilson Lumber Co. of Del. v. McAllister*, 101 F. (2) 709 (C. C. A. 9)). Here this Court has again overlooked the established fact that (1) the contract was judicially admitted in the prior probate proceeding; (2) all else but the contract was expressly admitted on the record below. Plainly under these circumstances petitioner could not lawfully be denied a decree.[8]

[8] The Circuit Court of Appeals and the several Supreme Court services which summarized the certiorari petition all erroneously described the suit as seeking to enforce an alleged "oral" contract in complete disregard of the fact that the contract was reduced to writing and that the motion to amend the complaint to conform to such documentary proof was granted without objection (R. 465)—a patent error that may well have been overlooked in this Court.

Conclusion.

Concededly this case does not involve a public right, the construction of a federal statute, a claim by a governmental agency or a question of civil or religious liberty. The jurisdiction of this Court is nowhere defined however as limited to these classes of cases despite such seeming self imposed limitation. This case does involve six substantial conflicts with applicable local decisions, three such conflicts with applicable decisions of this Court and three such conflicts with the applicable decisions in at least seven of the circuit courts of appeal—although one supposedly is enough under Rule 38 (5) (b). It does involve the denial of substantial property and contractual rights to a private citizen of the United States, whose right to redress has been defeated by intemperate personal attacks made upon him by respondents, both below and in the brief filed in this Court, for the obvious purpose of beclouding an issue that is actually non-existent. This Court, under its plenary powers of supervision and as the last bulwark of rights of vested property should, it is respectfully submitted, grant a review of this cause to the end that substantial justice may be done and the petitioner's vested rights under his admitted contract may be protected.

The order of November 18, 1940 denying certiorari should be vacated, the petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted and the entry of judgment herein by the United States District Court for the District of New Jersey stayed until further order of the Court.

Respectfully submitted,

Albert G. Avery,
George Gordon Battle,
Attorneys for Petitioner.

We hereby certify that this petition is presented in good faith and not for delay.

ALBERT G. AVERY,

GEORGE GORDON BATTLE,

Attorneys for Petitioner.